85-497

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

In Re Charges of Unprofessional Conduct Against N.P.,
Appellant.

JURISDICTIONAL STATEMENT

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THE PARTIES

The parties to this proceeding are as follows:

Appellant, whose name may not be identified pursuant to the Minnesota Rules on Lawyers Professional Responsibility Rule 20, Appendix D; and the Director and members of the Minnesota Lawyers Professional Responsibility Board, a Board established by the Minnesota Supreme Court.

Because 28 U.S.C. Section 2403 (b) may be interpreted as applicable to this appeal, a copy of the notice of appeal was served on the Attorney General of Mnnesota; and a copy of this Jurisdictional Statement will be served upon him.

QUESTIONS PRESENTED

1. Whether the State Supreme Court deprived appellant, an attorney, of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution by attributing to appellant responsibility for the delay in the lawyer's grievance proceedings against appellant when (a) State rules do not impose a duty on appellant to expedite the proceedings; (b) appellant's actions in producing the delays were solely under orders of the Minnesota Supreme Court and solely designed to protect appellant of his rights under the United States Constitution; and (c) appellant's actions in producing the delays resulted from the exercise of his right under the First Amendment to the United States Constitution to petition for a redress of grievances.

2. Whether the State deprived appellant, an attorney, of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution by failing to apply against the Minnesota Lawyers Professional Responsibility Board the Board's rule, established by the State Supreme Court, wherein the rule requires a prompt disposition of investigations relating to attorneys.

3. Whether the State Supreme Court deprived appellant of his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution when that State Court deferred ruling on appellant's constitutional rights and held instead that the proceedings are at a preliminary stage.

4. Whether the State Supreme Court deprived appellant of his right to due process of law as guaranteed by

the Fifth and Fourteenth Amendments to the United States Constitution when it failed to dismiss charges filed against appellant in the attorney's disciplinary proceedings although: (a) each charge against appellant contains multiple, discrete allegations, viz., charge 1, three allegations; charge 2, five allegations; charge 3, three allegations; charge 4, four allegations; charge 5, three allegations; (b) the MRLPR deprives appellant of due process of law because the rules fail to provide procedural devices for authoritative rulings on appellant's constitutional arguments and issues arising under the United States Constitution during the investigation and before the charges are made public; (c) the multiple, duplicitous allegations against appellant in the adversary stage of the preliminary, non-public panel hearing, deprive appellant of due process of law because they fail to state specific, discrete allegations; (d) the State discipline rules for attorneys deprive appellant of due process of law because DR 1-102 (A) (5); 1-102 (A) (6); 2-103; 5-105; and 5-106 are unconstitutional and have not been specifically interpreted by the Minnesota Supreme Court and should be given prospective effect only and not made applicable against appellant.

5. Whether appellee Director, Minnesota Lawyers Professional Responsibility Board, is depriving appellant of his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution by proceeding with the discipline action against appellant although the discipline rules forming the basis for the present proceedings were repealed by the Minnesota Supreme Court on August 31, 1985.

6. Whether appellant is being deprived of his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments, and the *ex post facto* clause of Article I, Section 10, Clause 1 of the United States Constitution by applying and enforcing the Minnesota Code of Professional Responsibility made effective September 1, 1985, long after the dates of the occurrences alleged in the charges against appellant.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota was issued on January 25, 1985 and is set forth in Appendix C. (App. 1) and is reported at 361 N.W.2d 386 (1985). The order denying appellant's petition for rehearing in the State Supreme Court is set forth in Appendix A (App. 34). The order of the State Court's denial of appellant's motion for stay pending review by this Court is set forth at Appendix B (App. 36). The charges against appellant were filed on May 8, 1984 and are set out in Appendix F (App. 20), are not officially reported, and are at this stage technically confidential, according to Rule 20, MRLPR, Appendix D (App. 45).

JURISDICTION OF THIS COURT

Appellant appeals to this Court from a final order of the Minnesota Supreme Court wherein that Court denied appellant's requested relief against the Minnesota Lawyers Professional Responsibility Board because of charges filed against appellant for discipline because of alleged actions

undertaken by him in his professional capacity as an attorney.

The first two questions presented to this Court involve the Minnesota Supreme Court's order (1) attributing to appellant delays in the investigative procedure in violation of appellant's rights under the U.S. Constitution and (2) exonerating the Minnesota Lawyers Professional Responsibility Board of its delay although its own rule, issued by the State Court, requires prompt disposition.

The third question involves appellant's constitutional right to procedural due process. and the state court erred in deferring ruling on those constitutional rights because the proceedings are held to be at a "preliminary stage." (App. 14).

The fourth question involves the actual charges against appellant; and they are duplicitous because of charging multiple, dissociated allegations in each charge; the duplicitous allegations deprive appellant of due process of law for failure to state specific allegations that would enable the appellant to defend and a court to review; and specific rules are unconstitutionally vague in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The fifth question raises the constitutional right of the appellant to have the charges dismissed against him because the discipline rules forming the basis of the charges against appellant were repealed on August 31, 1985.

The sixth question raises the issue of whether the State Supreme Court is barred from applying the rules of professional conduct, made effective September 1, 1985, retroactively in violation of the *ex post facto* clause of the United States Constitution.

This Court has jurisdiction to review the state court decision by reason of 28 U.S.C. Section 1257 (2), which grants to this court jurisdiction by appeal from a state court order which involves the validity of statutes of a state and their repugnance to the Constitution of the United States. Matters reviewable only by certiorari, 28 U.S C. Section 1257 (3), as herein discussed should be included with the appealable issues.

This Court has sustained jurisdiction on an analogous attorney's discipline case on reviewable issues arising under the United States Constitution, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, —— U.S. ——, 105 S.Ct. 2265 (1985).

This Court reviewed by appeal, *Lathrop v. Donohue*, 367 U.S. 820 (1961) the rules issued by the Wisconsin Supreme Court whereby it integrated the Wisconsin Bar Association.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The United States Constitution, Article I provides in part:

> Congress shall make no law * * * abridging the freedom * * * or the right of the people * * * to petition the Government for a redress of grievances.

United States Constitution, Amendment 5, provides in pertinent part:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

The United States Constitution, Amendment 14, provides in pertinent part:

> * * * nor shall any State deprive of any person of life, liberty, or property, without due process of law * * *.

The United States Constitution, Article I, Section 10, clause 1 provides in part:

> No state shall * * * pass any * * * ex post facto law * * *.

The pertinent provision of the Code of Professional Responsibility of Minnesota are set forth in Appendix E (App. 47).

The pertinent provisions of the Minnesota Rules on Lawyers Professional Responsibility are set forth in Appendix D (App. 37).

The pertinent provisions of the Minnesota Rules of Professional Conduct are set forth in Appendix G (App. 54).

STATEMENT OF THE CASE

1. Statement of Facts

Appellant brings before this Court the charges presently filed against appellant as an attorney for alleged violations of the Minnesota Code of Professional Responsibility.

Appellant N.P., whose identity is confidential, Rule 20, Minnesota Rules on Lawyers Professional Responsibility, Appendix D (App. 45) has been admitted to practice before the Bar of the Minnesota Supreme Court and lower courts of that State since 1949, he has been admitted to practice before the Bar of this Court and various United States Courts of Appeals for various circuits and the United States District Court for different districts. Appellant's office is located in Minneapolis, Minnesota, where he is engaged primarily in the representation of plaintiffs in per-

sonal injury claims. Before the present proceedings, appellant had had no experience with the disciplinary process.

On January 20, 1983, the appellee director of Lawyers of Professional Responsibility filed with the United States District Court in *Application of the Director of Lawyers Professional Responsibility,* Cr. No. 3-82-32, United States District Court, District of Minnesota, a motion for disclosure of the Grand Jury transcripts, documents obtained by a grand jury subpoena, and exhibits received in evidence at trial.

On March 18, 1983, appellee director filed an amended motion for disclosure.

Rule 25 of the Rules on Lawyers Professional Responsibility, RLPR. Appendix D (App. 46). provides that any lawyer must cooperate.

The United States District Court on September 16, 1983 ordered certain documents produced and deferred ruling on this appellant's argument that the duty to cooperate is unconstitutional.

Charges of unprofessional conduct against appellant were served on May 8, 1984.

On May 31, 1984, appellee requested, pursuant to Rule 25, MRLPR, appellant to provide discovery.

On June 1, 1984, appellee served on appellant requests for admissions, pursuant to Rule 9 (c), RLPR, Appendix D (App. 39). On June 6, 1984, appellant initiated this litigation by filing in the Minnesota Supreme Court a petition for writ of prohibition. This petition contended that Rule 25, MRLPR, is unconstitutional.

On July 6, 1984, the Minnesota Supreme Court granted appellant's motion for a stay of all disciplinary proceedings pending resolution of appellant's petition then pending.

On July 9, 1984, appellant filed a supplemental petition on the unconstitutionality of Canon 9, Minnesota Discipline Rules 1-102, 2-103, 5-105, and 5-106 and the charges.

On January 25, 1985, the State Supreme Court issued its memorandum opinion. Appendix C (App. 1).

On February 5, 1985, appellant filed a timely petition for rehearing before the State Supreme Court.

On July 17, 1985, the State Supreme Court entered an order denying the petition for rehearing. (App. 34).

On August 1, appellant filed a timely notice of appeal and served appellee and the Attorney General of Minnesota. (App. 35).

Appellant timely docketed this appeal.

This jurisdictional statement is timely filed.

2. Statement of the Case.

Procedural Posture. Appellant is the subject of an investigation by the Minnesota Lawyers Professional Responsibility Board. The proceedings are confidential at this stage, wherein the appellee director has filed charges against appellant, and those charges are to be submitted to a Panel, pursuant to Rule 9, MRLPR, Appendix D (App. 39).

Appellant sought and obtained review in the State Supreme Court on original petitions on each of the issues presented in this appeal. The State Court considered each issue and ruled against appellant in the original proceedings and in the order denying the petition for rehearing.

i. The State Supreme Court deprived appellant of constitutional due process by attributing to appellant the delays in the lawyers grievance proceedings. (Question 1).

Rule 2, Minnesota Rules on Lawyers Professional Responsibility provides that charges of "unprofessional conduct promptly be investigated and disposed of."

This rule imposes no obligation on appellant as the attorney under investigation to expedite the proceedings. Appellant's actions in producing delays were solely in seeking protection of rights under the United States Constitution.

The responsibility to expedite disciplinary proceedings rests solely with the enforcing agency. *The Florida Bar v. Pappy,* 358 S.2d 4 (Florida 1978).

The records before the State Supreme Court demonstrated that the appellee received a complaint in 1979 against appellant for allegedly having solicited lawsuits on behalf of women who had sustained personal injuries as a result of having used the intrauterine device known as the Dalkon Shield. The Director dismissed those complaints in 1979. In 1982, appellant was indicted by a United States Grand Jury in connection with alleged violation of the United States mail fraud statute for alleged solicitation of clients, conflicts of interest, division of legal fees with laymen, all issues presently involved in the charges against appellant. The extensive publicity on that indictment was known to appellee. After a lengthy trial, appellant was acquitted on November 25, 1982. In January, 1983, appellee sought from the United States District Court the grand jury documents. Appellant objected to those disclosures under Rule 6 (e) F.R.Civ. P., on among other

grounds the prosecutorial misconduct involved in the grand jury proceedings. *Sells, Inc. v. United States,* 642 F.2d 1144 (9th Cir. 1981); *United States v. Sells Engineering, Inc.,* —— U.S. ——, 103 S.Ct. 3133 (1983); *Sells, Inc. v. United States,* 719 F.2d 985 (9th Cir. 1983); *In the Matter of Grand Proceedings Miller Brewing Company,* 687 F.2d 1079, 1086 (7th Cir. 1982).

On May 8, 1984, appellee filed the charges of unprofessional conduct against appellee.

The only delays *caused* by appellant were those by orders of the State Supreme Court.

The State Supreme Court rejected appellant's argument about unreasonable delay, calculated that the actual investigation had been commenced four years before the charges were filed, and described it as "a lapse of time still substantially longer than the average attorney disciplinary investigation * * *." Appendix C (App. 8). The Court ruled that there was no prejudice to appellant and "* * * that much of the reason for delay is attributable to petitioner's own actions since September, 1982 in resisting the director's investigation. Appendix C (App. 9).

Appellant established in the Court below a litany of examples of prejudice. Furthermore, the Court deprived appellant of his right to due process of law by attaching a penalty for the delay which appellant caused solely through court orders and solely because of his attempt to obtain his constitutional right to substantive and procedural due process. This Court has held, *Spevack v. Klein,* 385 U.S. 511 (1967) that the courts may not impose sanctions which make the assertion of a constitutional privilege "costly" in an attorney's discipline proceedings.

ii. The State Supreme Court deprived appellant of due process of law by failing to apply against appellee the rule requiring prompt disposition of this case. (Question 2).

The State Supreme Court erred in omitting its own rule in determining delay in appellant's case.

The State Supreme Court did not mention, cite, or construe Rule 2, RLPR, which requires allegations of attorney's unprofessional conduct be "promptly investigated and disposed of."

Agencies are bound by their own regulations. *Vitarelli v. Seaton,* 359 U.S. 535, 540 (1959). See also *United States v. Shaughnessy,* 347 U.S. 260, 265 (1954).

The Director extended the delay to approximately 4 years. This is patently in violation of the rules. It has been held that "it is elemental that action beyond the scope of a body's own procedural regulation is a violation of due process of law." *Behagen v. Intercollegiate Conference of Faculty Representatives,* 346 F.Supp. 602, 606 (D.C. Minn. 1972).

What the State Supreme Court has done is attach an impermissible penalty for appellant's having successfully obtained delays in the courts. *Blackledge v. Perry,* 417 U.S. 21, 28-29 (1974). A person may not be deprived of access to courts to secure judicial protection of constitutional rights. *Talley v. Stephens,* 247 F.Supp. 683, 686 (D.C. Ark. 1965). The right to petition for redress of grievances includes access to the courts under the First Amendment. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972).

To the extent that the State Supreme Court held that appellant had contributed to the delay, to that very extent

the Court deprived appellant of his right to seek in the courts a redress of grievances.

iii. The State Supreme Court erred in avoiding ruling on certain constitutional issues on the grounds that they were preliminary. (Question 3).

The State Supreme Court's opinion held that the present proceedings against appellant involved a "preliminary nature of the charges", (App. 14), and held further that those charges need not comply with the "stricter standard we would apply to charges in a formal opinion but simply must give [appellant] a general idea of what actions are being challenged." (App. 14).

The posture of the case against applicant is an adversary proceeding, not a preliminary review of the file.

Rules on lawyers professional responsibility provide for the filing of the charges, notification of the attorney, and admission of some or all of the charges by the attorney. Rule 9. That same rule provides in (c) and (d) for discovery by admissions and depositions and a pre-hearing between the director and applicant to arrive at stipulations, simplification of issues, and marking of exhibits. (App. 39-44).

Thus, this is an adversary hearing. The State court erred in failing to apply the stricter standard of a formal petition.

This issue is of importance to the bar throughout the United States in respect to the procedural and substantive due process of attorneys in a discipline proceeding. The State Supreme Court erred in a very fundamental and prejudicial fashion in failing to recognize the adversary nature of the present proceedings. See *Morgan v. United*

States, 304 U.S. 1, 20 (1938). *United States v. Abilene and S. Ry. Co.,* 265 U.S. 274 (1924).

The Constitution is applicable to administrative actions "* * * to afford those affected by the action the traditional safeguards of due process." *Greene v. McElroy,* 360 U.S. 474, 506 (1959).

The Court's opinion deprived appellant of due process of law.

iv. The duplicitous charges against appellant deprive him of due process of law. (Question 4).

The charges as presently filed against appellant are grotesque. An oversimplification involves the obvious, that each charge involves multiple allegations against appellant: Charge I alleges 3 separate violations; Charge II alleges 5 separate violations; Charge III, 3; Charge IV, 4; Charge V, 3. (App. 20-31). Each allegation involves a preliminary statement, exhibits, and the charging paragraph, or in several counts, several charging paragraphs. Each charge involves allegations totally dissociated from the other allegations in the same charge.

Charge I for example alleges that appellant directed attorney Stephen Eckman to subvert the disciplinary investigation in violation of the discipline rules. (App. 22). However, the exhibit attached to that charge includes Eckman's affidavit that he was instructed by appellant to have each of the clients from the Duluth, Minnesota—Superior, Wisconsin area "* * * sign a document confirming that [appellant] and his agents had not solicited the client's case * * *;" and that appellant directed Eckman to dictate "* * * a strong letter to the doctor * * * to hopefully dissuade the doctor from his complaint * * *." The affidavit contradicts the allegation. (App. 66, 67).

Charge I alleges that appellant violated the discipline rules by solicitation of cases, payment of referral fees, and altering records to hide referral fees so as to subvert the disciplinary investigation. (App. 23).

Charge II in the preliminary statement asserts that appellant represented Dalkon Shield clients and alleges that the insurance representative "* * * regularly advised [appellant] as to additional work needed on these files to enhance the value of the claims." (App. 25). There certainly is nothing unusual about that. An exhibit supporting charge No. II asserts that that insurance agent stated that the insurance company was paying on Dalkon Shield claims and that some attorneys were getting fees of 50% on the claims. (App. 68). The exhibits directly contradict the allegation.

Charge II (App. 25, 26) alleges the following dissociated violations: appellant undermined the representative's loyalty to his insurance company; appellant's receipt of confidential information subverted the adversary systems; appellant's conflict of interest was to the detriment of clients, the insurance company, the insured, and the legal system; appellant's failure to disclose his employment of the representative breached his fiduciary duty; his settlement of claims with the representative jeopardized the settlements.

Charge III (App. 26-27), alleges that appellant represented 318 Dalkon Shield clients; that 26 clients, not identified, received settlement checks; it charges that appellant participated in "five block settlements", in violation of Dr 5-106 which refers to "aggregate settlements" and not group or block settlements. Charge III has separate allegations of appellant's failure to communicate with

his clients, failure to obtain his client's consent for settlement, and making block settlements.

Charge IV (App. 29-30) cites appellant for failure to maintain trust account monies, failure to pay to clients the interest earned on client monies, failure to separate client funds from law firm funds, and failure to maintain books and records.

Charge V, (App. 31) like the preceding four charges, has multiple, discrete allegations that appellant undermined insurance agents' loyalty to their insurance company, created a conflict of interest for the adjusters, and took advantage of them to the detriment of the appellant's clients, the insurance companies, the insureds, and the legal system, and charged clients for expenses not incurred and thereby converting clients' monies.

The charges are multiple in each count. The charges in each count are inconsistent with their preliminary statements in part, and they are contradicted in part by some of the exhibits.

The Minnesota rules fail to provide for dismissing multiple, duplicitous, contradictory, or unconsitutional allegations, exhibits, and charges. The State Supreme Court failed to establish what portion of each charge must be validated to issue discipline. Furthermore, the Court violated appellant's constitutional rights by holding that this was only a "preliminary investigation." (App. 14). This Court should accept review because of the precedent which this sets for duplicitous charges in discipline proceedings.

The multiple allegations make impossible the effective judicial review of a finding of discipline. The absence of totally separate and identifiable allegations presents a constitutional deficiency in the standard of proof and the

possibility of reaching any standard for each separate discipline violation. This is of critical importance to the Bar. This Court held, *United States v. Cruikshank*, 92 U.S. 542, 558 (1976), that the purpose of specificity in criminal indictments is in part "* * * to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." See also *Russell v. United States*, 369 U.S. 749, 768 (1962). This Court has never ruled on the specificity required in attorney discipline proceedings. The importance to the Bar in general is manifested by the importance of the result if there be a finding of discipline. There could be no effective judicial review because of the contradictions from the affidavits and exhibits and the charging allegations, between the contradictory or inconsistent or discrete allegations in each of the charging sections.

Attorneys are entitled to due process of law in any discipline proceeding. *Ex Parte Garland*, 4 Wall. 333, 71 U.S. 366, 370 (1867). The court should apply to appellant's allegations the principle enunciated in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, —— U.S. ——, 105 S.Ct. 2265, 2283 (1985), regarding vague discipline rules and due process concerns. Certain it is that the Court should review the charges in this case to determine whether they reached that specificity required under due process whether considered by the Fifth Amendment to the United States Constitution or as in criminal cases, the Sixth Amendment, and the Fourteenth. *Faretta v. California*, 422 U.S. 806, 818 (1975).

v. The State Court erred in sustaining the constitutionality of certain discipline rules. (Question 4).

Appellant in the original proceedings before the State Supreme Court attacked the constitutionality of certain discipline rules which were cited in the charges filed against appellant. Those discipline rules are DR 1-102 (A) (5) and (6); DR 5-105; and DR 5-106.

DR 1-102 (A) (5) and (6) provide that an attorney shall not engage in conduct prejudicial to the administration of justice or engage in any conduct adversely reflecting on one's fitness to practice law. The State Supreme Court held that they "* * * do no more than reflect the fundamental principle of professional responsibility that an attorney, as an officer of the court has a duty to deal fairly with the court and client. This duty embraces all of the ethical strictures of the Code of Professional Responsibility." (App. 15).

The State Court considered DR 5-105, which requires an attorney to decline employment if the exercise of his independent professional judgment for a client will be or is likely to be adversely affected by the acceptance of the proffered employment. The Court rejected appellant's attack and stated that "the words of the rule 'will or is likely to be adversely affected' indicate that an attorney sensitive to fiduciary obligations will err, if at all, on the side of rejecting questionable employment." (App. 18).

The State Court considered DR 5-106, which prohibits an attorney from engaging in "an aggregate settlement" unless each client has consented to the settlement after having been advised of the existence and nature of all the claims. The State Supreme Court stated that appellant,

> Particularly when viewed in the general context in which the rule was invoked, we find it most difficult to see how [appellant] was misled or misinformed. In any event, the complete text of the rule needs no parsing of words and phrases to clearly inform an attorney as to the kind of conduct that is prohibited. (App. 19).

This Court's recent decision in *Zauderer v. Office of Disciplinary Counsel of the State of Ohio, supra,* indicated vagueness may preclude any discipline greater than a reprimand. Footnote 15, —— U.S. ——, 105 S.Ct. at 2283.

These discipline rules are vague. There is nothing comprehensible to the charges of conduct "* * * prejudicial to the administration of justice" or conduct that "* * * adversely reflects on his fitness to practice law." DR 1-102 (a) (5) and (6). Totally unmeasureable is DR 5-105 (a), which requires an attorney to decline proffered employment "if the exercise of his independent professional judgment * * * will be or is likely to be adversely affected * * *." There has been no judicial uniformity in the definition of "aggregate settlement" which is the essential part of DR 5-106.

This Court has rejected incomprehensible standards imposed on lawyers. In *Konigsberg v. State Bar of California,* 353 U.S. 252 (1957), the applicant for the bar had been rejected for failing to prove his good moral character. The term was held to be "unusually ambiguous." 353 U.S. at 263. This Court set the standard of rejection by pointing out that the phrase there could have been defined in any unlimited number of ways to "* * * reflect the attitudes, experiences, and prejudices of the definer." *Ibid.* Phrased another way, the Court stated that "such a vague

qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrumentality for arbitrary and discriminatory denial of the right to practice law." *Ibid.* Mr. Justice Brennan in *Zauderer,* in concurring in part and dissenting in part, stated that:

> A regulation that 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essentials of due process of law.' —— U.S. ——, 105 S.Ct. at 2289.

The due process right to a specific discipline rule should be reviewed by this Court. The 7th Circuit has invalidated a regulation barring "conduct unbecoming a member and detrimental to the service" because it has "* * * no inherent, objective content from which ascertainable standards defining the proscribed conduct could be fashioned." *Bence v. Breier,* 501 F.2d 1185, 1190 (7th Cir. 1974).

THE STATE SUPREME COURT REPEALED THE DISCIPLINE RULES FORMING THE BASIS OF THE CHARGES AGAINST APPELLANT (Question 5).

The State Supreme Court on June 13, 1985 entered an order which considered the American Bar Association Model Rules of Professional Conduct as recommended by the Minnesota Bar Association. The Court then entered an order:

> Now, therefore, it is hereby ordered that the attached Minnesota Rules of Professional Conduct are adopted as the standard of professional responsibility for lawyers admitted to practice in Minnesota, effective September 1, 1985, and

> It is further ordered that the existing Minnesota Code of Professional Responsibility as adopted by the Minnesota Supreme Court on August 4, 1970, is hereby repealed, effective August 31, 1985. (App. 54-55).

a. The absence of a saving clause effectively repeals the existing Code of Professional Responsibility.

The State Supreme Court clearly did not make any attempt at preserving the present discipline rules because of its order actually repealing the rules. There is no rule from the Minnesota Supreme Court for a saving of existing regulations after the effective date of the repeal. Minnesota has a statute regarding the saving of statutes after that repeal, but the State Supreme Court, in *Larson v. Independent School District No. 314,* 305 Minn. 358, 233 N.W.2d 744 (1975) held that the amendment to the Minnesota Rules of Civil Procedure were applicable to pending cases and that the Minnesota Saving Statute did not apply in the construction of the court rule. This flows only naturally from that Court's ruling that the Constitution of the State of Minnesota and the inherent power of the judiciary reserved to the State Supreme Court the issuance of rules of practice. *Petition for Integration of Bar of Minnesota,* 216 Minn. 195, 12 N.W.2d 515, 518 (1943).

b. Repeal or change governing rules pending judicial review requires implementation only of the new rules.

The Minnesota Supreme Court, in *Larson v. Independent School District No. 314,* 305 Minn. 358, 233 N.W.2d 740, 747 (1975) is in agreement with the uniform principle

that a new rule or regulation during judicial review is implemented to control pending litigation. See *State Ex Rel. Bennett v. Brown,* 216 Minn. 135, 12 N.W.2d 180, 181 (1943).

See *State v. Coolidge,* 282 N.W.2d 511, 514 (Minn. 1979), where the state court there cited as its authority this court's opinion in *Bell v. Maryland,* 378 U.S. 226 (1964), which considered a conviction of some black students in Maryland for their having participated in a "sit-in" demonstration at a restaurant in 1960. During the appeal process, the State of Maryland enacted laws abolishing the crime, that is repealing the statute. This Court per Justice Brennan stated:

> * * * For Maryland follows the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it. 378 U.S. at 230.

c. The new Minnesota Court rules cannot be applied retroactively. (Question 6).

The charges filed against appellant relate to events which occurred before the filing of the charges in May, 1984, and therefore patently before the implementation of the new rules of professional conduct, which are made effective on September 1, 1985. The new rules, whether identical or similar to the Minnesota Rules on Lawyers Professional Responsibility, cannot be made retroactive.

United States Constitution, Article I, Section 10, Clause 1, provides in part that "No State shall * * * pass any * * * ex post facto law."

This Court, per Justice Marshall, in *Weaver v. Graham,* 450 U.S. 24, 28 (1981) stated that,

> The *ex post facto* prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'

The State Supreme Court could not now interpret rules or its implementing order for the new rules of professional conduct and thereby make them retroactive when such a judicial decision would enlarge the scope of the new rules. See *Camitsch v. Risley,* 705 F.2d 351, 355 (9th Cir. 1983).

While it might be suggested that the *ex post facto* proscriptions apply only to criminal cases, *Randall v. Reynoldson,* 640 F.2d 898 (8th Cir. 1980), *cert den.* 454 U.S. 880, it should be kept in mind that a lawyer's discipline proceedings are quasi-criminal. *In Re Ruffalo,* 390 U.S. 544, 551 (1968).

It is therefore clear that appellant is not subject to discipline proceedings under the September 1, 1985 rules of professional conduct.

d. Appellant has been prejudiced by the differences between the new rules of professional conduct and the former rules under which appellant was charged. (Question 7).

An analysis of the rules involved in the charges against appellant demonstrates that there has been a substantial

difference from the rules under which appellant was charged and the presently existing rules which became effective on September 1, 1985. For example:

Charge I alleges a violation of DR 2-103 (A) (2). (App. 47-48). This charge militates to appellant's disadvantage because the rules are substantially different. The charge involves soliciting and paying fees for referral of clients; new rule 7.3 (App. 63) adds the motive of the lawyer involved; the old rule restricted to proscribing compensating anyone for recommending or securing a client. These are substantial differences.

Charge I alleges a violation of 3-102 (a). (App. 49) which precludes sharing legal fees with a non-lawyer although "(3) a lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." This has been substantially modified by Rule 5.4 (a) (App. 62-63) which provides that fees paid for soliciting business may now be paid to the non-lawyers as a part of a compensation arrangement.

Charge I and II involves alleged violation of DR 1-102 (a) (6) (App. 46-47) in each of the two charging paragraphs. That DR refers to "* * * any other conduct that adversely reflects on his fitness to practice law." This is not incorporated into or referred to by Rule 8.4. (App. 64). It is, therefore, a non-existent rule in view of the repealing of the old rules of lawyers professional responsibility.

Charge II alleges a violation of 5-101 (a) (App. 49-50) which refers to barring a lawyer from employment "* * * if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own

financial, business, property, or personal interests." See new Rule 1.7 (App. 57-58) which refers to a lawyer not representing a client if the representation of the client will be *"directly adverse"* to another client unless the lawyer believes that the representation will not affect the client and each client consents. The new rule refers to conflicts between clients or with third persons or with the lawyer's own interests. The old rule refers to rejecting a client if the attorney's professional judgment will be affected by financial, business, property, or personal interests.

Charges II and III allege a violation of Rule 5-105, which requires a lawyer to decline a client if it is likely that the judgment apparently on behalf of a present client will be adversely affected or if it would involve representing different interests. This apparently is covered by Rule 1.7, although this new rule requires that the conflicts be "directly adverse." (App. 57).

Count III charges a violation of DR 5-106 (A), which requires that an attorney representing two or more clients in an "aggregate settlement," (the phrase not being defined), must have the consent of each client after having advised the client of among other things "the total amount of the settlement." (App. 51). The new rule. 1.8 does not require total settlement to be disclosed to the client although the existence and nature of the claims and the participation of each person must be disclosed. (App. 58). There is thus an obvious disparity.

Charge II and III allege violations of DR 7-101 (a) which requires that a lawyer not intentionally fail to seek the lawful objectives of the client except as provided in (B), which allows the lawyer to waive client's rights or refuse to participate in unlawful conduct. (App. 51).

New Rule 1.2 (a) provides that "* * * a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." (c) entitles an attorney to discuss legal consequences of the client's conduct. This rule has substantial variance from 7-101.

THE COURT SHOULD ACCEPT JURISDICTION ON THIS INTERMEDIATE APPEAL BECAUSE OF THE OVERWHELMING IMPORTANCE TO THE BAR.

This Court will accept jurisdiction when the Court's criteria are met despite the fact that further proceedings in the lower courts would otherwise occur. The present case involves a reported state decision sustaining the constitutionality of the rules and the constitutionality of the duplicitous charges. The Chief Justice for the Court in *Southland Corp. v. Keating,* —— U.S. ——, 104 S.Ct. 852. 856 (1984) pointed out that this Court would accept intermediate review of a state court decision when thereafter there may be no opportunity to pass on the federal issue would therefore allow to remain in effect the unreviewed decision of a state supreme court on an important issue. The predicate for that decision was *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975) which established the four categories for accepting jurisdiction on intermediate review. The court pointed out that in most of the cases accepted for intermediate review the additional state proceedings would not require decision of other federal questions that may require review by the Court later. 420 U.S. at 477. Appellant meets the first category for intermediate review because the federal issues now are conclusive on this matter, because if this Court sustains appellant's contentions, further proceedings would be barred.

The third category is met, because if appellant prevailed before the Board or before the State Supreme Court, there would be left in effect the present state court reported decision and no opportunity to change the state court's decision. 420 U.S. at 481. The fourth ground is met by appellant because the state court has finally determined the federal issues, and appellant may prevail on non-federal grounds and thereby render unnecessary this Court's review of the federal issues. The Court held that "in these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 483.

CONCLUSION

The Court should accept intermediate review by appeal or by certiorari because the state court opinion is not in conformity with the constitutional principles enunciated by this Court. The importance to the 17,000 lawyers practicing in Minnesota is obvious. The state court opinion authorizes duplicitous charges. The discipline rules involved in these charges have been repealed. Somewhat related rules became effective on September 1, 1985 with no saving clause to continue the viability of the earlier discipline rules; and the Court should hold that the new rules cannot be retroactive. This case involves well-established constitutional principles but are in some respects

novel to the procedures involved in disciplining attorneys. The Court should accept jurisdiction.

Respectfully submitted,

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